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No. 81-55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

PAUL IRA FERBER,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF ON BEHALF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, FREEDOM TO READ FOUNDATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC., AMERICAN CIVIL LIBERTIES UNION, THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC., NEW YORK CIVIL LIBERTIES UNION and ST. MARTIN'S PRESS, INCORPORATED AS *AMICI CURIAE*

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The American Booksellers Association, Inc., Association of American Publishers, Inc., Council for Periodical Distributors Associations, Freedom to Read Foundation, International Periodical Distributors Association, Inc., National Association of College Stores, Inc., American Civil Liberties Union, The Association of American University Presses, Inc., New York Civil Liberties Union, and St. Martin's Press, Incorporated, (collectively referred to as "*Amici*") submit this brief *amici curiae* in support of respondent Paul Ira Ferber, pursuant to Rule 36.2 of the Rules of

this Court, urging affirmance of the decision below.[1] This joint brief is submitted upon the written consents of both petitioner and respondent.[2]

The *Amici*

American Booksellers Association, Inc. ("ABA") is a trade association composed of booksellers located throughout the United States. The Association has approximately 5,200 members consisting of private bookstores, university bookstores, and chain bookstores.

The Association of American Publishers, Inc. ("AAP") is the major national association for publishers of general and educational books in the United States. Its more than 300 members include large commercial book publishers and small or non-profit publishers, university presses and scholarly associations.

Council for Periodical Distributors Associations ("CPDA") is a national trade association for over 500 independent local wholesale distributors of magazines, comic books, paperback books, and newspapers.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the right of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

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[1] The opinion of the New York Court of Appeals is reported at 52 N.Y.2d 674, 422 N.E.2d 523, 439 N.Y.S.2d 638 (1981).

[2] The written consents of petitioner and respondent to the filing of this brief are submitted herewith.

International Periodical Distributors Association, Inc. ("IPDA") is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

National Association of College Stores, Inc. ("NACS") is a trade association composed of 2500 college and university bookstores located throughout the United States.

The American Civil Liberties Union ("ACLU") is a nationwide nonpartisan organization of over 200,000 members dedicated solely to preservation of the liberties safeguarded by the Bill of Rights. During its sixty-one year existence the ACLU has particularly been concerned with protecting the First Amendment guarantees of freedom of speech and press.

The Association of American University Presses, Inc. ("AAUP") is an educational not-for-profit association serving university presses. Its 78 members include the presses of virtually all of the most distinguished American universities, as well as several Canadian and international scholarly publishers.

The New York Civil Liberties Union ("NYCLU") is a not-for-profit corporation organized under the laws of New York State for the purpose of defending and promoting individual rights and liberties. It is the New York State branch of the American Civil Liberties Union and has over 20,000 members throughout the State. Freedom of speech and of the press have been principal concerns of the NYCLU since its inception.

St. Martin's Press, Incorporated, a member of the AAP, is a New York City publishing house. It is a subsidiary of Macmillan Publishers Limited, the 130 year old British

publisher. One of the many books it has published is *Show Me!*, a non-obscene, photographic sex education book containing explicit, sex-oriented photographs and designed primarily for use by parents in educating their children about some of the emotional and physical aspects of sex.

Interest of *Amici*

As representatives of writers, publishers and sellers of non-obscene books and periodicals distributed throughout the United States, as well as members of the public at large who purchase, borrow and read such materials, and the librarians who serve them, *Amici* have a vital interest in assuring that the freedoms guaranteed by the First Amendment to the United States Constitution are neither narrowed nor abridged. In the context of this case, *Amici* AAP, AAUP, ABA, CPDA, IPDA and NACS also seek to protect the rights of their members, many of whom could arguably be subjected to criminal liability pursuant to the statute under attack should the Court of Appeals decision be reversed. *Amicus* St. Martin's Press, Incorporated, is the publisher of a book, *Show Me!*, which could arguably subject it to criminal liability. Indeed, if the decision of the Court of Appeals is reversed, St. Martin's Press would again fear prosecution for the distribution and sale of *Show Me!* even though it has been found not to be obscene by three courts in three different states. *See St. Martin's Press, Inc.* v. *Carey*, 440 F. Supp. 1196, 1201-1202 (S.D. N.Y. 1977), *rev'd on other grounds*, 605 F.2d 41 (2d Cir. 1979).[3]

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[3] While librarians, with whom *amicus* Freedom to Read Foundation is closely associated, are granted an affirmative defense against prosecution under Section 263.20(2) of the New York statute, a number of other state statutes covering mere dissemination of non-obscene matter, cited in Petitioner's brief (page 13, n.4), do not

(Footnote continued on next page)

This case represents an effort by a state to carve out a novel, broad and unprecedented exception to the First Amendment. The question presented here is whether, in the interest of protecting youngsters from being exploited "as subjects in sexual performances", New York can proscribe the dissemination of a broad range of non-obscene, constitutionally protected materials.

The Statute

While the Court has often been confronted with attempts by state and local governments to impinge upon First Amendment freedoms, it has never, except in the most extraordinary circumstances, upheld a statute that makes it a crime to disseminate First Amendment protected materials based solely on the nature of their content. By enacting Section 263.15 (set forth in the Appendix) (the "Statute"), the State of New York has—purely and simply —attempted to engraft into First Amendment doctrine an unprecedented and wholly unjustified exception to well-recognized classes of protected speech. The State has conceded this, boldly asserting that, ". . . *regardless of whether materials which are devoted to depicting the sexual abuse of children fit into any previously recognized category of unprotected speech*, prohibiting dissemination of those materials does not violate the First Amendment if the 'compelling state interest-less restrictive alternative' standard is satisfied" (Brief for Petitioner, p. 16) (emphasis supplied).[4] The Court should reject the State's well-intentioned, but constitutionally-misguided, effort to undo

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provide such an exemption and would therefore appear to criminalize the normal professional activities of librarians. *See, e.g.*, Ariz. Rev. Stat. Ann. §13-3553; Hawaii Rev. Stat. §707-751; Ky. Rev. Stat. §§11-9-1.1; Tex. Penal Code Ann., Tit. 9, §43.25(e); Wis. Stat. Ann. §940.203(4).

[4] *See* discussion *infra* at Point B concerning the State's flawed "compelling state interest-less restrictive alternative" argument.

the unbroken line of precedent granting full constitutional protection to the speech here at issue—non-obscene depictions of naked children or of adolescent sexual behavior.

For the laudable purpose of protecting children from sexual exploitation, New York has not only made it illegal in §263.05 to use a child in a sexual performance[5] and in §263.10 to "manufacture, sell, disseminate or display" *obscene* materials which depict sexual conduct by youngsters under the age of 16,[6] but also, by its enactment of the Statute, has criminalized the dissemination, sale or display of constitutionally protected non-obscene materials which portray juveniles in sexually related roles.[7] While the proscriptions as they pertain to obscene works do not raise constitutional problems (*see Miller* v. *California*, 413 U.S. 15 (1974)), the prohibitions in the Statute banning the dissemination of First Amendment protected materials cannot be supported by any decision of the Court.

Under the Statute, it is a crime to participate in the public dissemination of any material which contains any depiction of actual or simulated sexual conduct by a child or "lewdly" exhibits the child's genitals.[8] No countervailing consideration is permitted for the artistic, literary, political or scientific merit of the work in which the photograph or other visual representation appears. According to the New York legislature, the dissemination of any material containing a depiction, actual or simulated, of juvenile sexual conduct is per se injurious to the well-being of the child, regardless of the context in which that con-

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[5] New York Penal Law, §263.05 (McKinney).

[6] New York Penal Law, §263.10 (McKinney).

[7] New York Penal Law, §263.15 (McKinney).

[8] New York Penal Law, §263.00 (McKinney).

duct is portrayed. Thus, adults in New York are deprived of their right to view or obtain, and publishers and booksellers are deprived of their right to disseminate, a broad variety of constitutionally protected materials.[9] *Cf. Butler* v. *Michigan*, 352 U.S. 380 (1957).

The Misconceptions Urged by Petitioner and Its Supporting Amici

Despite the broad claims of petitioner and its supporting *Amici* ("Petitioner's *Amici*") in briefs filed here in opposition to the Court of Appeals decision, the Statute is not a "child pornography" law. The task of proscribing child pornography is amply taken care of by other sections of the New York Penal Law, specifically §263.05 controlling the creation of such materials and §263.10 prohibiting the dissemination of related obscene works. To the contrary, the Statute reaches beyond the unprotected obscene materials prohibited by §263.10. It permits law enforcement officials to enter legitimate bookstores and libraries in order to seek out non-obscene works which arguably fall within the Statute's broad proscriptions of content.

As the U.S. Senate Judiciary Committee noted in considering a proposed federal child pornography bill that prohibited the dissemination of both obscene and non-obscene depictions of sexual conduct by children:

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[9] *E.g.* serious compilations of artistic photographs, such as Sullivan, *Nude Photographs, 1850-1980* (1980), pp. 47, 78, 125 and 134; Ruby, *The Human Figure: A Photographic Reference for Artists* (1974), pp. 309-317; Mason, *The Family of Children* (1977), pp. 84-85; Mark, *Prostitutes of Bombay* (1981); Hamilton, *Sisters* (1973); and the works cited in footnotes 22 and 27, *infra*. The overbreadth is compounded by the fact that the Statute defines "sexual conduct" to include "lewd exhibition of genitals" (New York Penal Law, §263.00-3). "Lewd" has not been defined by the legislature and can readily be interpreted to encompass a wide variety of genital exhibition.

"The Committee also believes that the enactment of such a provision would be unnecessary. It was the opinion of the experts who testified before the Committee that virtually all of the materials that are normally considered child pornography are obscene under the current standards. Thus, they can be prohibited under the existing federal obscenity statutes. Indeed as was noted earlier, federal authorities have already begun an extensive crackdown on child pornography." S. Rep. No. 95-438, 95th Cong., 2d Sess. 13, [1978] U.S. Code Cong. & Ad. News at 50.

Consequently, regardless of the nature of the motion pictures involved in this particular case (which, from their descriptions in the brief might well have been found obscene by a jury), it would be improper to view this appeal as one involving merely the adult entertainment districts of New York's larger cities where "child pornography" may be peddled, an activity that will continue to be prohibited by §263.10 even if the Statute is not resurrected. The focus, rather, should be on the overbroad impact of such statutes on legitimate publishers, booksellers, medical schools, and libraries, many of which stock, purchase and disseminate materials of serious artistic, literary, political or scientific merit that appear to fall within the ambit of the Statute. These works are not only fully entitled to First Amendment protection, but could not, by the remotest stretch of the imagination, be said to constitute "child pornography".

Potential Consequences Beyond the Scope of This Case

A reversal of the Court of Appeals decision will signal to the states that the Court sanctions direct invasions of First Amendment protections whenever a state can articulate

a reasonable sounding basis for doing so. Other new laws attempting to regulate a wide variety of speech are certain to follow, leading ultimately to a limiting redefinition of the scope of free expression through countless appeals to the Court. This burdensome process can easily be avoided. New York's interest in the well-being of its children is adequately protected by §263.05 prohibiting use of children in the creation of sexually related works and §263.10 which bans all child pornography.[16] An affirmance of the Court of Appeals decision holding the Statute unconstitutional will signal to the states that they may properly ban both the production and sale of child pornography, as well as sexual use and abuse of children, without regard to First Amendment considerations, but that they may not criminalize the dissemination of legitimate non-obscene works.

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[16] *See also* New York Penal Law, §260.10 (McKinney) (child abuse as a crime) and New York Soc. Serv. Law, Art. 6, Tit. I (care and protection of children, including abused children; see §371-4-b).

ARGUMENT

The Statute Violates the First Amendment to the United States Constitution.

The First Amendment, as interpreted by this Court, is intended to foster a wide open exchange of ideas and expression, free from state interference.

> "It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen* v. *California*, 403 U.S. 15, 24 (1971).[11]

Amici of course recognize that certain sexually explicit speech, if found obscene, is not protected First Amendment

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[11] Justice Holmes likened First Amendment protections to a free market for ideas, only allowing individual choice to determine what information is communicated.

> "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution." *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

In accord, *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940) ("The safeguarding of these rights to speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to a free government.")

expression. *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973). New York State, however, does not attempt to justify the Statute's proscriptions based upon an obscenity standard. Its justification, rather, is that in order to protect minors from commercial sexual exploitation, the dissemination of *all* materials containing certain sexually related depictions of children, even those with serious merit, must be banned.[17] Such a drastic measure is unprecedented, finds no support in the previous decisions of the Court, and goes much further than is required to alleviate the perceived harm. Accordingly the Statute, by imposing such overbroad restrictions, should be held unconstitutional as an infringement of First Amendment rights.[18]

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[17] As stated by the New York State legislature upon passage of New York Penal Law, §263.00 *et seq.*:

> "'The legislature finds that there has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances.
>
> 'The legislature further finds that the sale of these movies, magazines and photographs depicting the sexual conduct of children to be so abhorrent to the fabric of our society that it urges law enforcement officers to aggressively seek out and prosecute both the peddlers of children and the promoters of this filth by vigorously applying the sanctions contained in this act.'" Legislative Findings and Declaration, New York Penal Law, §263.00 (McKinney).

[18] In fact, the only decisions known to *Amici* construing the constitutionality of statutes such as the one in issue in this case have found them unconstitutional. *St. Martin's Press* v. *Carey*, 440 F. Supp. 1196 (S.D.N.Y. 1977) *rev'd on other grounds* 605 F.2d 41 (2d Cir. 1979); *State* v. *Shingaki*, Hawaii Cir. Ct., 1st Cir., Cr. No. 54385, Apr. 27, 1981. *See also*, Pope, *Child Pornography: A New Role for the Obscenity Doctrine*, 1978 U. Ill. L. Forum 711, 743-44 ("New York's rejection of the obscenity doctrine [§263.15] appears patently unconstitutional.")

A. *Section 263.15 Does Not Fall Within Any of the Established Exceptions to the First Amendment*

In *Roth* v. *United States*, 354 U.S. 476 (1957), the Court noted the obvious: ". . . sex and obscenity are not synonymous" (at 487). For this reason, the Court recognized,

> "It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." *Id.* at 488.

The principle enunciated in *Roth*—that treatment of the subject of sex will be accorded constitutional protection unless the material in issue is found to be legally obscene—remains bedrock constitutional doctrine. Thus, in *Miller* v. *California*, *supra*, 413 U.S. at 29, the Court unequivocally announced: "[T]oday . . . a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment." *Accord: Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U.S. at 69 ("We have directed our holdings, not at thought or speech, but at depiction and description of specifically defined sexual conduct that States may regulate within limits designed to prevent infringement of First Amendment rights"); *Kaplan* v. *California*, 413 U.S. 115, 119-20 (1973) (pictures, films, printed words "have First Amendment protection until they collide with the long-settled position of this court that obscenity is not protected by the Constitution").

It is precisely because non-obscene sexual expression "taken as a whole" contains "serious literary, artistic, political or scientific value," *Miller* v. *California*, *supra*, 413 U.S. at 34, that such expression is entitled to First Amendment protection "regardless of whether the government or a

majority of the people approve of the ideas these works represent." *Id. See also Cohen* v. *California, supra,* 403 U.S. at 24-25 (unpleasant or offensive consequences of free expression constitute the "necessary side effects" of achieving "the broader enduring values" promoted by such expression).

In light of the foregoing, the New York Court of Appeals was entirely correct in finding overbroad the State's total prohibition of the dissemination of "non-obscene sexual performance involving children," 52 N.Y.2d at 678, and in recognizing that, "no matter what the government's objective, First Amendment standards remain applicable whenever the effect of a government regulation is to curtail protected modes of expression." 52 N.Y.2d at 679. This does not mean that a state may not curtail the use of children in the creation of child pornography. It is constitutionally free to do so, as New York has, by punishing those who employ or induce children to engage in proscribed forms of sexual conduct. To the extent a state wishes to curtail the publication or dissemination of materials depicting adolescent sexual activity by those having no relationship to the actual child abuse, it may also constitutionally do so, but only as § 263.10 provides, by punishing those who publish or disseminate legally obscene materials depicting such conduct.

Notwithstanding that the speech sought to be curbed by the Statute is non-obscene and hence entitled to constitutional protection, New York urges rejection of such "overly simplistic First Amendment analysis" (Brief for Petitioner, p. 7) in favor of the crafting of a massive constitutional loophole. This loophole, however, would enable the government to prohibit otherwise protected expression whenever it arguably promotes illegal activity. Thus, the State as-

serts, without benefit of any supporting authority: "Section 263.15 . . . is premised on the sound idea that the state can properly forbid distribution of materials produced in a certain manner if the state has properly prohibited that manner of production." Brief for Petitioner, p. 10. It is the State's contention that the ban on dissemination of non-obscene protected expression is constitutional solely because it furthers the State's interest in protecting children from child abuse. *Id.*

Amici have been unable to find a principled basis on which to justify the State's position; in fact, there is none. In considering the State's position, the Court must of course be guided by the recognition that exceptions to classes of speech entitled to First Amendment protection are few, "well-defined and narrowly limited." *Cohen* v. *California, supra,* 403 U.S. at 19-20; *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571-72 (1942). *See also Hess* v. *Indiana,* 414 U.S. 105 (1973). The expression proscribed by the Statute fails to fall within the obscenity exception. Neither does that speech fall within any of the other established exceptions, *e.g.,* fighting words (*Chaplinsky* v. *New Hampshire, supra*), defamation (*see New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964)), or incitement to imminent lawless activity (*see Brandenburg* v. *Ohio,* 395 U.S. 444 (1969)). The State is thus asking the Court to adopt an entirely new exception to the First Amendment, unsupported by precedent. To accede to this request would require the Court to exclude from First Amendment protection all speech that has a tendency to make illegal activity more likely, since that is the only connection alleged by the State between the speech to be suppressed and a legitimate state purpose. Such an expansive new exception, however, is both unwise and unwarranted.

The required nexus between the speech sought to be censored and the illegal conduct said to be provoked thereby has previously been addressed by the Court. In *Brandenburg* v. *Ohio, supra,* 395 U.S. at 447 and *Hess* v. *Indiana, supra,* 414 U.S. at 108, the Court delineated the limited situations in which speech may be suppressed on the basis that it is likely to cause illegal conduct taking the form of street violence. According to the Court in *Brandenburg,*

> "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio, supra,* 395 U.S. at 447, quoted in *Hess* v. *Indiana, supra,* 415 U.S. at 108.

There is simply no compelling reason to dilute the *Brandenburg* test to accommodate the Statute. *Cf. Carey* v. *Population Services International,* 431 U.S. 678, 701 (1977). As discussed above, the cost of such a contraction of First Amendment rights is substantial. As the Court stated in *Cohen* v. *California, supra,* 403 U.S. at 24, "most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions." Surely, in an area of First Amendment doctrine as well-explored as the issue of the illegal conduct "caused" by speech, the fact that the Statute fails the established test as completely as it does demonstrates clearly its unconstitutionality.

B. *The Statute's Restriction on Speech Is Not Content Neutral; Nor Is It the Least Restrictive Alternative Available to Promote the State's Purpose*

The Statute, imposing restrictions on the content of First Amendment protected speech, is unconstitutional, especially since there are less restrictive alternatives available. Although the State relies heavily upon this Court's decision in *United States* v. *O'Brien*, 391 U.S. 367 (1968),[14] to support the Statute, such reliance is misplaced.

O'Brien involved the prosecution of a demonstrator for burning his draft card in public to protest against the Vietnam War. He was tried under the 1965 Amendment to §12(b)(3) of the Universal Military Training and Service Act (50 U.S.C. App. §462(b)(3)), which makes it a crime "knowingly" to destroy or mutilate a selective service registration certificate. O'Brien argued that the statute violated the First Amendment by effectively denying to him his right to express disapproval of the war by the act of burning his card.

Finding the statute constitutional, the Court set out the test to be applied when a law regulating conduct is challenged as violative of the First Amendment:

> "[A] governmental regulation is justified . . . [1] if it furthers an important or substantial government interest; [2] if the governmental interest is unrelated to the suppression of free expression; and [3] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 377.

Here the Statute regulates the conduct of *Amici* and others similarly situated by proscribing the dissemination

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[14] *See* Brief for Petitioner, p. 11.

of certain constitutionally protected works. Assuming, arguendo, that such a prohibition is rationally related to the furtherance of a legitimate concern of the State of New York (at least to the extent that the minors protected are residents of the State of New York) and thus complies with the first of the criteria,[15] it nonetheless fails to meet the other two.

The harm allegedly protected against is not, as required by the second part of *O'Brien*, unrelated to the suppression of First Amendment rights.[16] The Statute is directed only at materials which portray certain juvenile sexual activities. Consequently, it is the harm perceived to be caused by the message itself which has led to criminalization of the works covered by the Statute.

In similar contexts, the Court has not sanctioned indiscriminate direct invasions of First Amendment freedoms. When students were suspended from school for wearing armbands in protest of the Vietnam War, their suspensions were overturned. The Court's decision emphasized that the suspensions were invalid because they were made pursuant to a regulation which banned only the specific form of expression chosen by the students.

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[15] *Amici* do not deny that §263.05, barring the actual "use" of children, furthers the legitimate and important state interest in protecting children from sexual child abuse. The relation, however, between the dissemination offenses and the desire to prevent child abuse is, of course, far more tenuous. Section 263.10, dealing with "obscene" matter, is presumptively constitutional under *Miller* v. *California*, *supra*, whether or not it otherwise furthers the State's interest in child protection. The Statute, on the other hand, is far removed both from the actual criminal abuse and from the dissemination of materials without constitutional protection. Therefore, in *Amici's* view, it raises far more difficult questions, even under the first branch of the *O'Brien* test. In this respect the burden is on the State. *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976).

[16] See, for example, note 12, *supra*, wherein the State interest, as expressed by the New York legislature, is set forth.

Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969).

In another case, when a protestor was convicted of disturbing the peace merely for wearing a jacket containing a disquieting epithet directed toward the military draft, the Court once again found that the state action was unconstitutional. California, by its prosecution of the protestor, unconstitutionally intended to shield the public from the form of the communication chosen. *Cohen* v. *California, supra.*

Only where the regulation of conduct is "content neutral" (*see United States* v. *O'Brien, supra* and *Prince* v. *Massachusetts*, 321 U.S. 158 (1944)[17]) or where the restriction on expression is "minimal" (*Young* v. *American Mini Theatres Inc.*, 427 U.S. 50 (1976); *Schad* v. *Borough of Mount Ephraim*, —— U.S. ——, 101 S.Ct. 2176 (1981)) has the Court tolerated the concomitant abridgement of First Amendment protections.

The Statute is not "content neutral". It is aimed only at certain sexually related speech and ignores other communications or expressions which may similarly cause injury to young juveniles. *See People* v. *Ferber*, 52 N.Y.2d at 680-81. By singling out only works depicting certain conduct, the Statute is patently unconstitutional. *Cf. Tinker, supra*, 393 U.S. at 510-11; and *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 214 (1975). Nor is the restriction minimal; it is, in fact, absolute.

Even if the Court were to find the Statute "content neutral," it still must fall under the third criterion of

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[17] See also, Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1496-1502 (1975).

O'Brien in that it restricts First Amendment freedoms to a greater extent than is necessary.

As evidenced by the legislative policy statement issued upon passage of the Statute,[18] New York is primarily concerned with eliminating the sexual exploitation of persons under age 16. This result is still achieved if the Statute is declared unconstitutional in that separate provisions in the New York Penal Law already proscribe the creation as well as dissemination of child pornography.[19] Section 263.05 makes the use of children in the creation of child pornography illegal while §263.10 bans its dissemination. These are sufficient to not only effectuate the state policy of protecting youths from sexual exploitation, but, as a less restrictive alternative, also avoid any infringement of First Amendment freedoms by not also criminalizing non-obscene works. See *Schad* v. *Borough of Mount Ephraim, supra,* 101 S. Ct. at 2183.

C. *New York's Interest in Protecting the Welfare of Children Living Within the State Does Not Justify the Denial of First Amendment Rights*

Petitioner claims that New York's interest in the protection of its children is sufficiently compelling so that constitutional rights to publish, distribute and sell certain non-obscene materials can be restricted. The State urges that it is "physically, psychologically and emotionally harmful" for a child to be depicted engaging in various categories of sexually related conduct in any work, regardless of its legitimate value.[20]

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[18] See note 12, *supra.*

[19] New York Penal Law §§263.05 and 263.10 (McKinney). *See also* the statutes regulating child abuse cited in fn. 10, *supra.*

[20] See Brief for Petitioner, pp. 14-15.

This very argument, that a state's interest in protecting the reputation and emotional well-being of its youths outweighs First Amendment freedoms, has previously been made to, and rejected by, the Court. In *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979), a newspaper printed the name of a juvenile offender in violation of a West Virginia law which prohibited such a publication absent the prior written approval of the Juvenile Court. The State urged that the law was a constitutional attempt to protect the welfare of West Virginia youths who become enmeshed in the criminal process at a young age.[21] Chief Justice Burger, writing for seven of the eight justices who heard the case, rejected the argument that such an interest could outweigh First Amendment rights.

> ". . . [T]he reasoning of Davis [v. Alaska, 415 U.S. 308 (1974)] that the constitutional right must prevail over the state's interest in protecting juveniles applies with equal force here.
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> "The magnitude of the State's interest in this statute is not sufficient to justify application of a criminal penalty to respondents." *Id.* at 104.

Similarly, in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), the Court denied enforcement of a Georgia statute which, in effect, deprived the media of its right to publish or broadcast the name of a rape victim in order to protect her family's right of privacy.

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[21] The state interest is described in the Court's opinion as follows:

"The sole interest advanced by the State to justify its criminal statute is to protect the anonymity of the juvenile offender. It is asserted that confidentiality will further his rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense." *Smith* v. *Daily Mail Publishing Co.*, *supra*, 443 U.S. at 104.

Here, like *Smith* and *Cox*, the enunciated state interest cannot prevail over the First Amendment rights of *Amici* and others to disseminate legitimate works which contain non-obscene depictions of juvenile sexual conduct.

D. *The Amended Statute, by Failing to Provide an Exemption for Medical, Scientific or Educational Material, Is Overly Broad and Unconstitutional*

An absolute prohibition of the dissemination of all works which depict children engaged in certain categories of sexually related conduct, regardless of obscenity, clearly regulates protected speech. The State so concedes in its brief. (Brief for Petitioner, p. 26.) If the Statute is upheld, *Amici's* publisher, distributor, and bookseller members will be denied their right to disseminate a wide range of medical, scientific and educational works which, as an essential part of their content, contain sexually related pictures of naked youths.[22]

This Court has repeatedly stressed that laws are overbroad and unconstitutional when they restrict First Amendment freedoms in the process of regulating unprotected expression.

> "A . . . threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils

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[22] *See, e.g.*, Falkner, *Human Development* (1966), pp. 184-221 (This text is geared toward educating physicians, scientists and students studying anatomy, genetics, biochemistry, physiology, psychology and behavioral science and in furtherance thereof, contains explicit photographs of minors displaying various genital deformities); Waldo, *Textbook of Pediatrics* (1979), pp. 1567-1570, 1623-1630 (Basic pediatric text dealing with diagnosis and treatment); Rudolph, *Pediatrics* (16th Ed. 1977), pp. 1328, 1608, 1678, 1713-14, 2015 (Pediatrician's desk book for diagnosis and treatment); Forfar and Arniel, *Textbook of Paediatrics* (1973), pp. 1052-55, 1115 (Pediatrician's desk book for diagnosis and treatment); and Lightwood, Brimblecombe and Barltrop, *Paterson's Sick Children* (9th Ed. 1971), pp. 203, 206, 208 (Text dealing with diagnosis of children's diseases).

> within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill* v. *State of Alabama*, 310 U.S. 88, 97-98 (1940).[23]

Furthermore, the Court is not constrained by the facts of this case in determining the constitutionality of the Statute.[24] When a law is attacked on overbreadth grounds, the Court must look beyond the record to other unrelated potentially improper applications of the regulation at issue:

> "[T]he instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner

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[23] See also *Erznoznik* v. *City of Jacksonville*, *supra*, 422 U.S. at 216 ("This Court has long recognized that a demonstrably overbroad statute or ordinance may deter the legitimate exercise of First Amendment rights."); and *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965).

[24] While it is true that Ferber was convicted under the Statute and acquitted under §263.10, it is likely that the jury's unwillingness to impose a double penalty, and not the nature of the seized films' contents, was the reason for such action. Due to their similar wording, a defendant cannot be convicted under §263.10 without also being found guilty under the Statute because all "obscene" sexual performances violate both provisions. Had only §263.10 been on the books, it is likely that Ferber would have been convicted under that statute. (See Brief of *Amici* Keating and Citizens for Decency Through Law, pp. 30-31) Consequently, the nature of the films which formed the basis for Ferber's conviction should not be regarded as illustrative of the kinds of works proscribed by the Statute.

has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432 (1963)

As noted, the State readily admits that protected expression is proscribed by the Statute, but proposes that such overbreadth be ignored here and dealt with on a case-by-case basis in later criminal prosecutions.[25] The Court has previously considered and emphatically rejected similar proposals.

"When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See Baggett v. Bullitt, supra, 377 U.S. at 379. For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions . . .' N.A.A.C.P. v. Button, 371 U.S. 415, 433." *Dombrowski* v. *Pfister, supra,* 380 U.S. at 486.

Cf. Gooding v. *Wilson*, 405 U.S. 518, 520-21 (1972).

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[25] See Brief for Petitioner, p. 26:

"To take an instance cited by the court below (App. A. at 5a) in the unlikely event that a person would ever be prosecuted for showing 'a filmed report of New Guinea fertility rites,' that person could interpose a defense based on the unconstitutionality of the statute as applied. Given the legitimate breadth of the statute, these limited situations can be dealt with on a case by case basis, without resort to the drastic remedy of declaring the statute unconstitutional on its face."

These are not hypothetical concerns. *Amici's* members, publishers and distributors of legitimate materials, face the real threat of criminal prosecution pursuant to the Statute's overbroad prohibitions. Apart from actual prosecution, the "chilling effect" of such an overbroad statute is equally real. The New York legislature's failure to include an exemption for medical, scientific and educational works, as well as the coexistence of §§263.10 and 263.15, is conclusive of its intent to regulate, by the Statute, both protected and unprotected expression. In light of this obvious overbroad legislative intent, recognized by the Court of Appeals below, the Statute cannot be construed narrowly. *Cf. Prince* v. *Massachusetts, supra,* 321 U.S. at 163. The Court should, therefore, find the Statute unconstitutional on its face and permanently enjoin the State from its enforcement.

E. *By Allowing the Moral Values of Some to Dictate What May Be Read by All, the Statute Impermissibly Infringes Upon the Rights of Parents and Teachers to Educate Children About Sex With the Aid of Materials Designed to Deal With the Subject in a Frank and Non-Obscene Manner*

Among our most sacred freedoms are those protected by the First Amendment to the United States Constitution. *N.A.A.C.P.* v. *Button, supra.* They ensure that no person or group will ever be able to set out the subjects about which we can read, think or teach. *Cf. Cohen* v. *California, supra.* The State and Petitioner's *Amici,* however, seek to impose their view of morality upon the State of New York by banning the protected works covered by the Statute. The Court in *Near* v. *Minnesota,* 283 U.S. 697 (1931) rejected a similar attempt to restrict the scope of First Amendment freedoms:

"'If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited.' The danger of violent reactions becomes greater with effective organization of defiant groups resisting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the Constitutional protection would be reduced to a mere form of words." *Id.* at 722.

A focal point of the briefs of Petitioner and Petitioner's *Amici* is the emphasis placed upon calling all photographs of young juveniles engaged in certain conduct "child pornography". In the context of the Statute, which proscribes non-obscene works, use of such a term is erroneous and misleading. "Pornography" is defined as "obscene or licentious writing, painting, or the like".[26] Where, however, children are depicted in materials which *have* serious scientific, literary, political or artistic merit, those works are not, by definition, obscene. They should not be categorized as "child pornography."

Within this group of materials, the dissemination of which is criminalized by the Statute, are pictorial texts intended to aid parents and teachers in educating children about anatomy, sex and sexual relationships.[27] The authors

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[26] *Webster's New International Dictionary* (2d Ed. 1957), Unabridged, p. 1922; See also, Black, *Black's Law Dictionary, 5th Ed.*, West Publ. Co., 1979, p. 1075.

[27] See, Waxman, *Growing Up Feeling Good; A Child's Introduction to Sexuality* (1979) (Teaches human sexuality to children by discussing love, love making and genital development. Using pictures to supplement the written material); Waxman, *What is a Girl? What is a Boy?* (1976) (Very basic pictorial essay

(Footnote continued on next page)

of these works uniformly believe that there is a psychological benefit to being exposed to such materials at a young age. It is thought that by seeing pictorial presentations of sex in an open and unembarrassed manner, youths will not need to learn about relationships, birth control and pregnancy on street corners, and, further, can more easily develop into mature, aware adults.

The *President's Commission on Obscenity & Pornography* ("President's Commission") came to a similar conclusion in its 1970 report where it stated:

> "Biological studies indicate that boys and girls enter pubescence earlier than formerly was the case, and, as a result, are aware of their sexual feelings earlier. It is highly desirable at this stage in their development that they receive straightforward information from their parents, from the school, and from qualified community agencies. . .
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> "A study by Offer (1969) defines the levels of sexual development that young people in high school and college experience, and suggests that as interest in the opposite sex begins to crystallize, attitudes are more important initially than overt sexual behavior. These developing attitudes must be based on accurate and complete information regarding sexuality if subsequent behavior is to be responsible and mature.

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of anatomy geared toward children. Designed to teach the differences between males and females.); Goldstein, Haeberle and McBride, *The Sex Book, A Modern Pictorial Encyclopedia* (1971) (Pictorial encyclopedia of anatomy and sexuality with accompanying text.); McBride and Fleischhauer-Hardt, *Show Me!* (1975) (A picture book of anatomy and sexual relationships for parents and children.); and Nass, Libby & Fisher, *Sexual Choices* (1981) (Text book for college classes studying human sexuality which includes photographs of naked children as an aid to understanding the textual material).

> "Sex education, then, must be expanded and more fully developed as an integral element of general health education to insure its adequacy to meet the needs of the whole community. *Both parents and young people require adequate sources of reliable information, and the community should provide these sources through its trained personnel and institutions.*" Report, Bantam Books Edition, pp. 312-13. (emphasis added)

Included in such works, of necessity, are depictions of persons under the age of 16 so that the youngsters reading these books can fully understand their own sexual development from childhood to puberty through adulthood. While all Americans may not agree that non-obscene pictorially honest renditions of anatomy and sexual relationships are the best way to educate children about human sexuality, it would be contrary to our Constitutional freedoms to deny those parents who choose to have their children taught with such materials their right to do so. *See Ginsberg* v. *New York*, 390 U.S. 629 (1968).[18] The statute, however, would deny parents this choice. As stated by the Court in *Cohen* v. *California, supra*, 403 U.S. at 21, those individuals who are offended by such texts can avoid exposure to them "simply by averting their eyes."

By permitting books to be banned in the manner contemplated by the Statute, the Court would be impliedly saying to children that sex is a subject which can be dis-

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[18] In *Ginsberg*, the Court stated:

"First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, supra at 166." *Id.* at 639.

cussed openly only in back alleys and on street corners. It is this attitude that the President's Commission concluded must be eliminated if our society is to ever outgrow its preoccupation with pornography:

> "Sex education, *straightforward and adequate begun in the home,* continued in school, and supplemented by community agencies such as religious, medical and other service institutions, can reduce interest in pornography as a source of information and can assist in developing a healthy attitude toward sexuality." Report, p. 312. (emphasis added)

The Court must not allow the moral values of some to be thrust upon all. Individual choice is the cornerstone of a free society. The Statute, as a proscriptive law aimed at eliminating only certain forms of protected speech, should be held unconstitutional as denying New Yorkers of their right to free expression.

F. *The Statute Cannot Be Saved by Analogies to So-Called "Trafficking" and "Contraband" Laws Which Require the Existence of an Underlying Crime and That the Speaker Be Directly Involved in That Criminal Activity*

Amicus curiae Covenant House, in its brief (pp. 19-22), attempts to support the constitutionality of the Statute by analogy to the so-called "trafficking" and "contraband" laws, i.e., federal criminal statutes which ban certain transmissions and communications involving, or made with the knowledge of, various underlying crimes. The "trafficking" statutes referred to by Covenant House relate to the transmission of wagering information (18 U.S.C. §1054) and the promotion of racketeering activities (18 U.S.C. §1952); the contraband statutes referred to prohibit the disclosure of information obtained through illegal wiretapping (18 U.S.C.

§2511(1)(c)) and the sale of products manufactured with oppressive child labor (29 U.S.C. §212(a)).[29] These analogies, however, fall wide of the mark for two important reasons.

First, the Statute, as recognized by the Court of Appeals below, bars the dissemination of works even if they contain pictures taken outside New York "in another State or country where such conduct may not be prohibited." *People* v. *Ferber*, 52 N.Y.2d at 680.[30] Petitioner and Covenant House support this interpretation.[31] Thus, since the photographs may have been taken where their production did not violate any law, there is not necessarily an underlying crime, as is required in all the "trafficking" and "contraband" statutes cited by Covenant House.

In addition, due to its multi-jurisdictional application, the Statute can subject a seller to criminal liability for disseminating works which contain photographs that he reasonably believes were legally taken outside New York State or outside the country since knowledge is not an element of the crime.

Petitioner and Covenant House also assert that the Statute is no different in principle than the prohibition of the products manufactured with child labor in violation of 29

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[29] Petitioner also makes a similar argument concerning the child labor laws at pages 17-18 of its brief.

[30] In *St. Martin's Press, Inc.* v. *Carey*, 605 F.2d 41, 44 (2d Cir. 1979) the majority opinion suggested that the New York courts would interpret the Statute not to include films or photographs produced outside the United States. This interpretation, however, was squarely rejected by the New York Court of Appeals in the decision below. In fact, at the trial of this case, the Respondent himself attempted to prove that the films in question were taken and produced in Europe, but his offer of proof was disallowed as irrelevant.

[31] See, Brief for Petitioner, pp. 29-32; and Brief of Covenant House, pp. 23-25.

U.S.C. §212. The child labor laws, however, unlike the Statute, clearly do not infringe upon protected speech. *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Litigation*, 12 Mich. L.J. Reform 295, 316 n.127 (1979). It is one thing to say that children cannot be hired to produce a newspaper. It is quite another thing to argue that it cannot be sold because it contains photographs of child labor.

This distinction was recognized by the Court in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946) where it stated:

> "The broadside assertion that petitioners 'could not be covered by the [Fair Labor Standards] Act,' for the reason that 'application of this Act to its newspaper publishing business would violate its rights as guaranteed by the First Amendment,' is without merit. If Congress can remove obstructions to commerce by requiring publishers to bargain collectively with employees and refrain from interfering with their rights of self-organization, matters closely related to eliminating low wages and long hours, Congress likewise may strike directly at those evils when they adversely affect commerce. *The Amendment does not forbid this or other regulation which ends in no restraint upon expression or in any other evil outlawed by its terms and purposes.*" 327 U.S. at 192-193 (citations omitted; emphasis added)[22]

Second, the federal laws cited by petitioner and Covenant House banning certain communications require not only the

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[22] The Court added in a footnote to the above statement in *Oklahoma Press Publishing Co.*, that "[n]o question is presented whether Congress could enforce its mandate by excluding from commerce the circulation of a publisher refusing to conform." 327 U.S. at 193 n.8.

existence of an underlying crime, but also, contrary to the assertion of Covenant House,[33] the person doing the communicating be involved with, or have knowledge of, the underlying crime. The Statute, to the contrary, subjects a seller to liability even though he may have had nothing to do with the original production of the picture and knows nothing about it.

For this reason, neither newspapers which merely convey information regarding illegal activities nor gambling "tip sheets" are proscribed by either §1084 or §1952. 18 U.S.C. §1084(b); *U.S.* v. *Alpirn*, 307 F.Supp. 452 (S.D.N.Y. 1969); *Kelly* v. *Illinois Bell Telephone Co.*, 210 F.Supp. 456 (N.D. Ill. 1962), *aff'd*, 325 F.2d 148 (7th Cir. 1963). Indeed, it has been held that if statutes such as these did apply to a "speaker" not involved with the underlying crime, they would be in violation of the First Amendment. *Kelly* v. *Illinois Bell Telephone Co., supra* at 465.

In contrast, the Statute does not require any involvement by the disseminator in the actual photographing of a child or any knowledge by him that the photograph was taken in violation of law. The dissemination of a work can be in violation of the Statute even though its production was not in violation of §263.05, and, indeed, even if such production was not a crime of any kind.

It is apparent, therefore, that the analogies drawn by Petitioner and Covenant House to interstate communications and distribution proscriptions where they relate to criminal activities are without merit.

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[33] See Brief of Covenant House, p. 20.

CONCLUSION

For the reasons set forth above, the Statute is unconstitutional, and therefore the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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